Sun Tech Group, Inc. d/b/a St. Thomas Gas *and* United Steelworkers of America, AFL–CIO, CLC. Cases 24–CA–8421, 24–CA–8495, and 24–RC–8055

October 1, 2001

DECISION, DIRECTION, AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On September 7, 2000, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

DIRECTION

IT IS DIRECTED that the Regional Director for Region 24 shall, within 14 days from the date of this Decision, Direction, and Order open and count the ballots of Christian Plaskett, Cresida Chesterfield, Patrick Harrigan, and Clara Stevens. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sun Tech Group, Inc. d/b/a St. Thomas Gas, St. Thomas, U.S. Virgin Islands, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, offer Christian Plaskett, Cresida Chesterfield, and Patrick Harrigan full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed."

2. Substitute the following for paragraph 2(c).

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT create the impression among our employees that their union activities are under surveillance by management.

WE WILL NOT interrogate our employees about their union sympathies.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by laying off (discharging) employees Cresida Chesterfield, Patrick Harrigan, and Christian Plaskett, we find in agreement with the judge that union activity was a motivating factor in the discharges and that the Respondent has failed to prove that the alleged discriminatory conduct would have taken place even in the absence of the protected union activity. See *Manno Electric,* 321 NLRB 278, 280, fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

In addition, with regard to the judge's finding that the Respondent's layoff of employees Chesterfield, Harrigan, and Plaskett was unlawful, we rely on the judge's finding that the Respondent failed to present evidence supporting its defense that the layoffs were due to a seasonal slowdown in business. We find it unnecessary to rely on the judge's further observations on the implausibility of the Respondent's defense.

[2] We will modify the judge's recommended order to include a reinstatement remedy and to conform with our recent decision in *Ferguson Electric Co*., 335 NLRB 142 (2001).

WE WILL NOT lay off (discharge) or otherwise discriminate against employees for assisting the United Steelworkers of America, AFL–CIO, CLC, or any other union, and engaging in concerted activities; and WE WILL NOT discourage employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Christian Plaskett, Cresida Chesterfield, and Patrick Harrigan full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Christian Plaskett, Cresida Chesterfield, and Patrick Harrigan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the discharges of Christian Plaskett, Cresida Chesterfield, and Patrick Harrigan and, WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

SUN TECH GROUP, INC. D/B/A ST. THOMAS GAS

Lourdes Vanessa Garcia, Esq. and *Efrain Rivera Vega, Esq.,* for the General Counsel.

Jomo Meade, Esq., of Frederiksted, St. Croix, United States Virgin Islands, for the Respondent.

Luis A. Tito Morales, Field Representative, of Charlotte Amalie, United States Virgin Islands, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. These consolidated cases were heard before me in St. Thomas, United States Virgin Islands, on March 21, 2000, pursuant to unfair labor practice charges filed originally on August 19, 1999 (in Case 24–CA–8421), by United Steelworkers of America, AFL–CIO, CLC (the Union) against Sun Tech Group, Inc. d/b/a St. Thomas Gas (the Respondent). On November 29, 1999, the Union filed additional unfair labor practice charges (in Case 24–CA–8495) against the Respondent. On November 30, 1999, the Regional Director for Region 24 issued an initial complaint against the Respondent and, on January 1, 2000, she amended the complaint and consolidated the cases for hearing.

On July 14, 1999, the Union filed its petition for certification of representative with the National Labor Relations Board (the Board) and pursuant to a Stipulated Election Agreement approved by the Regional Director on August 24, 1999, an election was held on September 9, 1999, among all employees of the Respondent at its St. Thomas, U.S. Virgin Island facility. On February 4, 2000, the Regional Director issued her report and recommendation on challenged ballots,[1] notice of hearing, and order consolidating cases and transferring the election matter to the Board.

The complaint as consolidated alleges that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging employees Christian Plaskett, Cresida Chesterfield, and Patrick Harrigan because they joined and supported the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.[2] The Respondent is also charged with violating Section 8(a)(1) of the Act by creating an impression among its employees that their union activities were under surveillance and by interrogating employees about their union sympathies.

On February 18, 2000, the Respondent filed its answer essentially denying the commission of any unfair labor practices. The Respondent, however, admitted that the individuals described in paragraph 5 of the complaint, along with the respective position and title associated with each, were supervisors within Section 2(11) of the Act. The Respondent did not file any particularized response to the report of the Regional Director regarding the challenged ballots.

With the exception of the Charging Party, the parties were represented by counsel at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witness, and to introduce evidence. The parties were also afforded an opportunity to submit posthearing briefs. On the entire record, including my observation of the demeanor of the witnesses, and considering the briefs filed by the General Counsel and the Respondent,[3] I make the following.

FINDINGS OF FACT

I. JURISDICTION—THE BUSINESS OF THE RESPONDENT

The Respondent, a United States Virgin Islands corporation, maintains an office and place of business in Charlotte Amalie, St. Thomas, U.S. Virgin Islands, and engages in the sale and distribution of propane gas and related products and services throughout the U.S. Virgin Islands.[4] The Respondent admits that during the past year, in conducting its business operations,

[1] The tally of ballots revealed that there were approximately 14 eligible voters, with 4 votes cast for the Union, 4 votes cast against the Union; and 4 challenged ballots. There were no void ballots. Neither party filed objections to the election or conduct affecting the results of the election. However, the Regional Director determined that the challenges were sufficient to affect the results of the election.

[2] The three alleged discriminatees voted in the election, and their ballots comprise three of the four challenged ballots. The fourth challenged ballot relates to an individual—Clara Stevens—who stated that she was a supervisor. The eligibility of the three alleged discriminatees to vote in the election is therefore contingent on the deposition of the unfair labor charges.

[3] The Charging Party did not file a brief.

[4] The Respondent's headquarters is located on the island of St. Croix, U. S. Virgin Islands.

it purchased and received at its St. Thomas facility goods valued in excess of $500,000. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Respondent admits, and I find and conclude, that the United Steelworkers of America, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

The Respondent is engaged in the business of selling and distributing propane gas by the cylinder for primarily the Island's residential users. The Respondent employs around 12 employees who serve as drivers and/or driver/helpers and clerical or office workers; the Respondent employs four drivers and four driver/helpers. The Respondent requires its drivers to meet a quota of delivering 30 gas cylinders per day, and collecting the empties, along a prescribed route. The driver/helpers accompany drivers and are charged with the loading, and unloading, of cylinders; assisting in the delivery of full and retrieval of empty cylinders from customers, and installing cylinders onsite.

The Respondent's management team at the St. Thomas facility consists of a general manager, Leroy Mills, who primarily supervised the drivers and helpers; and Lera Andrews, office manager, who supervised the receptionists and clerical workers. The Respondent's chief executive officer is Hector Peguero, whose main office was located in St. Croix.[5]

Beginning around mid- to late May 1999, certain of the Respondent's employees determined that working conditions at the facility were not acceptable. Consequently, during this period, the Union was contacted and authorization cards were signed by around six employees. Alleged discriminatees Harrigan, Plaskett, and Chesterfield were among those who supported the Union and signed authorization cards.[6] The Respondent discharged Plaskett on May 26, 1999; Chesterfield and Harrigan were laid off on June 10, 1999. The Respondent cited economic reasons—a decline in business as a result of the Company's annual slow season—in the termination of the three employees. The Respondent has not rehired the three alleged discriminatees.[7]

B. The 8(a)(3) Allegations

The complaint, in essence, alleges that Plaskett, Chesterfield, and Harrigan were discharged unlawfully by the Respondent because they joined and assisted the Union in the Union's attempt to organize the Company's employees during the relevant period in question.[8] The General Counsel called the three alleged discriminatees, and a current employee, Michael Caines, to establish these allegations.

1. The layoff of Patrick Harrigan

Patrick Harrigan testified that his employment with the Respondent began around October or November 1997 as a driver's helper; he was hired by Mills. According to Harrigan, his daily quota of propane cylinder deliveries and retrievals was 30, which he claimed he met for the most part in 1999, as he had in 1998. According to Harrigan, he enjoyed a good working relationship with his immediate supervisor, Mills, and even socialized with him after work, usually at a local bar. Harrigan stated that Mills often complimented him for his work, indicating that he performed his job well. However, in October 1998 Harrigan said that he was fired, in his view unfairly by the Company for an incident involving his alleged mishandling of company funds.[9] However, after filing a wrongful discharge claim with the local labor department, he was ordered reinstated to his position in February or March 1999. When Harrigan returned to his former position, he decided to approach the Union, in particular to see Luis (Tito) Morales, about organizing the Respondent's employees around mid-May 1999. According to Harrigan, he did not get to see Morales but did speak to another union representative who gave him union literature and a quantity of authorization cards at that time. Harrigan returned to work and approached certain employees whom he trusted and provided these persons with cards[10] around May 21 through 25 or 26, 1999. According to Harrigan, he obtained signatures from six of the employees but did not immediately turn them over to the Union in the hope that two additional employees, Merrifield and Padgett, could be convinced to sign. Harrigan turned the six cards (plus his) in to Morales around June 10 when these two signatures were not forthcoming. Harrigan also related that on one occasion before his layoff in 1999, he and Mills were socializing at a local bar. Mills asked if we (the employees) had visited the Union and mentioned that there were rumors about a union being estab-

[5] Peguero, Mills, and Andrews are admitted supervisors. I would find and conclude that the uncontroverted testimony and other credible evidence of record supports a finding that these persons exercise supervisory functions for the Respondent within the meaning of Sec. 2(11) of the Act.

[6] Plaskett signed a union authorization card on May 24, 1999 (see GC Exh. 8); and Chesterfield signed her card on the same date (see GC Exh. 9). Harrigan's authorization card (see GC Exh. 5) is signed but undated. Based on his credible testimony, I would find and conclude that he signed this card before the Respondent laid him off, most probably some time between May 21 through 26, when he handed the cards out to the other employees. (Tr. 41.)

[7] Chesterfield and Harrigan's layoff notification memoranda (GC Exhs. 10 and 6, respectively) indicated that if business were to pick up in the near future, they would be rehired. Plaskett's termination memorandum (GC Exh. 7) advised that his services were terminated until further notice, with no promise of rehire should business improve.

[8] For purposes of discussion, the relevant period in question covers around May 20 through September 9, 1999, the date of the election.

[9] Harrigan explained in some detail the incident for which he was discharged. In brief, Harrigan received some monies for a gas cylinder from a customer on a Sunday when the office was closed and was to turn the money in on the next business day, Monday. He claimed to have forgotten to bring the money in the next day and, on learning of his failure to do so, the president of the Company felt that he should be fired for violating company policy governing such matters. Mills, to whom he had initially given the money but who instructed Harrigan to turn it in himself the next business day, did not support the termination because he knew the circumstances of the matter.

[10] Harrigan was able to recall that he spoke to alleged discriminatees Plaskett and Chesterfield, as well as fellow employees Michael Caines, Godfrey Hughes, James Dyer, Merrifield, and George Padgett and gave each an authorization card. Hughes, Padgett, and Merrifield did not sign a card according to Harrigan.

lished at the Company, that "somebody" was trying to start a union. According to Harrigan, he told Mills not "somebody" but that he (Harrigan) was the one responsible for bringing the Union in. (Tr. 34.) Nothing more about the Union was said in this conversation. However, according to Harrigan, he and Mills talked generally about the Union on different occasions.

Harrigan stated that on June 10, the Respondent's management convened a meeting with the employees to discuss grievances between management and the workers. Management was represented by Mills and two executives from St. Croix (Roy) Gumbs and Fayre, with Gumbs leading the discussion. After this meeting, Harrigan was given a layoff letter[11] by Gumbs. The letter indicated that he was being laid off because of business slowdown, and that he would be recalled when business picked up. According to Harrigan, he was surprised to receive the letter because he was told by Mills that his performance was good. Moreover, he thought that layoffs were based on seniority. Furthermore, Harrigan said that he was meeting his 30-cylinder quota and he saw no falling off of business; the same quotas were being met by all the drivers. According to Harrigan, he asked Mills about the matter, but Mills claimed ignorance and said to him that Gumbs had brought the letter from St. Croix headquarters. Harrigan thereupon took the letter to Gumbs who said that Peguero gave him the letter and that he (Gumbs) did not know what was in the letter.[12]

According to Harrigan, after his layoff, he called the Company everyday to inquire whether business had picked up sufficiently for his rehiring and generally spoke to Mills on those occasions. Harrigan testified that he tried to speak to Peguero about the matter but Peguero would not talk to him. According to Harrigan, even on a chance encounter at a bar, Peguero simply walked away and avoided him.[13]

Harrigan testified that Peguero knew of his union activity because Mills had told him that he told Peguero that he (Harrigan) was organizing the workers. Additionally, according to Harrigan, while Mills never said that Peguero said that he was going to fire him (Harrigan) because of the Union, Mills told him that Peguero had accused Mills of sleeping on the job because of the union activity going on under his nose.

Regarding the election, Harrigan testified that he voted in the election although he was then employed with another Company.

2. The discharge of Christian Plaskett

Plaskett testified that he was hired in February or March 1999 as driver/driver's assistant by Mills;[14] his duties included helping load and unload gas cylinders and hooking up the cylinders at customer locations.[15] When hired, Plaskett said that he was placed on a 90-day probationary status by Mills who advised him at the time that if his work habits were not up to par, he would be released; but Miller said that he would be told if he passed muster during the requisite period.

According to Plaskett, Harrigan gave him a union card, which he signed on May 24, 1999, and returned it to Harrigan. Plaskett believed that Mills knew he had signed the union authorization card because 2 days before he signed the card, he and a number of other employees, while waiting for delivery schedules, were discussing employee grievances and the need for organizing a union. Moses Bastion and Merrifield, whom Plaskett described as supervisors, were in the group and both opposed the Union. However, Plaskett admitted that he had no personal knowledge that these two individuals informed Mills of his or any other employee's support of the Union. In any event, Plaskett testified that 2 days later, on May 26, on his arrival for work that morning, Mills told him that he was being laid off because it was the slow season for the Company. According to Plaskett, he told Mills that he was lying and cursed him, saying he was full of [expletive] and that they both knew what the real reason—the Union—was for his layoff.[16] Mills then produced a letter officially notifying him of his discharge effective that day.

Plaskett stated that the layoff angered him because he knew that the business could not be slow as he was delivering 30–35 cylinders per day and that it seemed to him that the Company was very busy. Also, he discovered from a coworker, James Dyer, that around 2–3 weeks after he was let go that the Company had hired someone else in his place, a man named Molyneaux.[17] According to Plaskett, he was never questioned by management about any frequent absences[18] or ever informed that his performance was below par.

3. The layoff of Cresida Chesterfield

Chesterfield testified that she was hired by Office Manager Lera Andrews as a receptionist in December 1998 on a 3-month probationary basis. According to Chesterfield, her duties also included dispatching information to drivers, receiving cash from drivers and customers, and balancing the accounts at day's end; she also answered the telephones, filed and entered data into the company computers. Chesterfield worked with two other office workers, namely accounts receivable clerk, Jamila Descartes, and Felicia Ortega who served as receptionist and front desk clerk. According to Chesterfield, she was senior only to Ortega. Chesterfield testified that in May 1999, she was approached by Harrigan about going with the Union, and he

[11] The layoff letter was signed by Hector Peguero in St. Croix.

[12] Gumbs did not testify at the hearing.

[13] According to Harrigan, Mills had promised to speak with Peguero on his behalf to get his job back.

[14] Plaskett's employment application (GC Exh. 13) indicates that he started work with the Respondent on February 15, 1999.

[15] According to Plaskett, he was hired as a driver but was assigned driver/helper duties by Mills until he learned company routine. However, Plaskett drove a vehicle only a couple of times during his employment with the Respondent.

[16] According to Plaskett, another employee, James Dyer, was present when these conversations occurred.

[17] Teddy Molyneaux, according to his job application, applied for work with the Respondent on September 1, 1999, and was hired by Leroy Mills on the same day as a tractor head driver. Molyneaux's experience and training included tractor operation. (See GC Exh. 14.) According to Plaskett, Dyer introduced Molyneaux to him as the man who replaced him during a parking lot encounter. During his time with the Company, Plaskett said he never saw anyone operating a tractor at the job and did not know what a tractor head operator was. Again, Dyer did not testify at the hearing.

[18] Plaskett admitted that he may have been absent from the job on two to three occasions, but that he had a doctor's excuse for each time.

gave her an authorization card to fill out and return to him. On May 24, Chesterfield said that she filled out, signed the card, and returned it to Harrigan.[19] According to Chesterfield, she talked to several employees who solicited her opinion about the Union. She told them that she supported the Union because she felt that the Respondent's management did not care for or about its employees.[20]

Chesterfield attended the June 10, 1999 staff meeting presided over by Gumbs; Mills was also present. The grievances of the workers were aired at the meeting. After the meeting, Andrews handed her a letter advising that she was being laid off due to the slow season.[21]

According to Chesterfield, Andrews approached Gumbs and asked why she was being laid off[22] but Gumbs said that he did not know the reason. Andrews told Chesterfield to deal with the matter as she saw fit.[23]

Chesterfield, while admitting that she had no formal training in business finance and that her duties did not give her direct knowledge of the overall financial condition of the Company she believed, nonetheless, that based on the number of trucks delivering cylinders on any particular day—sometimes two trucks per day—and the amount of money she received daily as part of her duties to balance daily receipts, that the Company was receiving orders and doing well. In short, in her view, business was not slow. Chesterfield believed that her signing with the Union was the reason she was laid off, although she could not with certainty say that either Mills or Peguero knew that she was supporting the Union[24] or that she was discharged because of her union activities.

Regarding the union election, Chesterfield stated she voted and that no one interfered with her in the exercise of her vote. Chesterfield also stated that she has never been contacted by the Respondent for purposes of rehire; but she admitted that she had not made inquiry as to whether business had picked up or otherwise sought her job back. Chesterfield testified that after her layoff, some time in August or September 1999, she saw another person working at the office and asked a manager, Rosita Leslie,[25] why she (Chesterfield) had not been called back. Leslie advised her that her layoff was not Leslie's problem and to see Peguero about the matter.

The General Counsel subpoenaed Michael Caines, a current employee of the Respondent, to testify in support of the charges.

Caines testified that he has been employed by the Respondent for the past 6 years, starting first as a driver's helper and progressing to driver. Caines' immediate supervisor is Mills.

According to Caines, he was approached by Harrigan and asked to join the Union and, while openly supportive of the union cause, he was never disciplined because of his views. Caines stated that he was approached by Mills 1 day in June 1999 after Chesterfield and Harrigan were laid off. According to Caines, Mills told him that Peguero suspected that he (Caines) had brought the Union in. After this conversation, Caines testified that Mills told him that they (the Respondent) had a (layoff) letter for him just like the one given to Harrigan and Chesterfield and suggested that Caines had better watch himself. According to Caines, Mills continually reminded him of this and repeated this threat over and over. (Tr. 110.)[26]

Regarding the Respondent's business cycle, according to Caines, during his tenure with the Company, he has not observed or experienced a slow season, mainly because the Respondent is one of only two companies that provides residential cooking gas for the entire island. Caines also testified that during the time in question, he did not see any "slow down" in the number of cylinders he personally or other drivers delivered. According to Caines, the Respondent's business is a cash-on-delivery type, although some commercial customers pay on time by established account.[27]

Caines testified that he likes working for the Respondent and enjoys the work he performs for them as it keeps him physically fit. However, he viewed management as completely unconcerned about its workers, and he dislikes the way it treats them. Accordingly, he thought the Union would be beneficial to the employees and expressed openly his desire to be a part of the Union.[28]

[19] Chesterfield's signed and dated card is contained in GC Exh. 9.

[20] Chesterfield identified coworkers Dyer and Conroy Hanley, who approached her after work outside of the work compound. According to Chesterfield, she also spoke with employee Michael Caines around the time she signed the card.

[21] See GC Exh. 10. This letter was initialed by Peguero.

[22] Andrews did not testify at the hearing; she has since left the Company.

[23] Chesterfield testified that she retained an attorney and filed actions alleging racial discrimination and wrongful discharge with the Federal Equal Employment Opportunity Commission and as well as local labor authorities against the Respondent. (See e.g., GC Exh. 11, a copy of her complaint with the Virgin Islands Department of Labor in which she alleges racial discrimination and her signing with the Union as reasons for her layoff.)

[24] Chesterfield also acknowledged that, as with other employees, she, too, had had a run-in with Mills in April 1999 about an in-office problem and she felt he wanted her discharged. Chesterfield claimed that aside from a letter from Mills regarding the incident, she has never been disciplined by the Respondent. In fact, she wrote a letter to Peguero about the incident, and he convened a meeting with the staff and Miller, and nothing more was said about the matter.

[25] According to Chesterfield, Rosita Leslie was officed in St. Croix and often was in charge in an acting capacity when Peguero was off-island. The other employee she saw working in the office was later identified to her as Clara Stevens. Notably, in the Regional Director's Report, Stevens was said to be a supervisor and whose ballot was challenged on that ground.

[26] Caines stated that similar threats were made in the presence of a Mr. Handley on one occasion; but he could not remember the date, only that it occurred in the afternoon. Caines testified that to this day, Mills continues to harass him unfairly, finding fault with his production—although he meets his 30-cylinder quota—and criticizing him about calling in if he is not available for work. Mills generally complains about the way he performs his job.

[27] Caines admitted that he has no direct knowledge of the other financial records of the Company and he is not (trained as) an accountant. (Tr. 121.) Caines implied that in short, he observed no falling off in deliveries and collections to justify a layoff or slow business.

[28] Caines noted that the Respondent's employees work with propane gas, which he described as a hazardous material, but the Company provided no medical insurance. Caines also spoke of an occasion where he got into dispute with Mills who asked him to drive a truck

The Respondent called Leroy[29] Mills to rebut the General Counsel's case.

Mills testified that he personally terminated Plaskett, mainly because the period (he described as) the summer time was the Company's slow season. Mills also stated that in deciding who would be laid off during the slow season, he considers the employees' productivity, performance, and behavior. According to Mills, Plaskett was the last person hired so he laid him off. Mills also noted that "he (Plaskett) was still on probation, and he was always calling in sick and absent, on a regular basis." (Tr. 169.)[30] Mills further stated that under company policy, a supervisor may evaluate an employee as unsuitable within the probationary period and without notice to the employee.[31] According to Mills, Plaskett also became expendable because often he would not be available for work on Saturdays and he (excessively) left work early to pick up one of his children. Mills emphatically denied any personal knowledge[32] of Plaskett's involvement with the Union, and maintained that he was made aware of the Union after June 10, when he received a letter (presumably from the Union).[33] Mills admitted, however, that he was aware of the employees' grievances during the relevant period.

Regarding Harrigan's testimony that on a social occasion, he (Mills) said that the termination was because of his union activity, Mills testified that he did not recall telling him that. (Tr. 172.) Mills claimed to have no personal knowledge of Harrigan's union involvement. According to Mills, Harrigan showed him the termination letter and asked about it. Mills said he told Harrigan he knew nothing about it, that it came from the boss at the main office.[34]

Mills claimed a similar ignorance about the circumstances surrounding Chesterfield's layoff, which he said was ordered by management in St. Croix. According to Mills, he was not involved in the "whole situation," as the letter (like Harrigan's) came from St. Croix and was delivered to Chesterfield's supervisor, Andrews. According to Mills, although he was the "overall supervisor' at the St. Thomas facility, he did not on a regular basis directly supervise Chesterfield.[35] However, Mills, in spite of his limited contact with Chesterfield, found her to be rude and insubordinate on one occasion, and he advised her supervisor that he felt that Chesterfield was not a good employee because of her behavior and attitude. According to Mills, he inquired of Andrews whether Chesterfield's probationary period was up because he thought she was really out of line. However, he was advised that her probationary period had ended, so he wrote a letter about the incident and placed the letter in her file[36] instead of discharging her for insubordination. Mills maintained without elaboration that Chesterfield, like Harrigan, was let go because of the slow season.

Mills could not recall any discussions with Caines regarding union activities, however he admitted that both he and Peguero know that Caines "has been affiliated with the Union . . . and he's not been terminated. He still is currently employed." (Tr. 179.) However, Mills who directly supervised Caines, stated that Caines rarely met his 30-cylinder quota and, in his view, was not a productive worker; that his personnel file has lots of memos about his behavior; and Caines has been suspended five to six times for refusal to carry out company policy among other things.[37] According to Mills, Caines should have been fired, but he sympathized with him. Also, due to Caines' long service with the Company and his (Mills') distaste for terminating people, Caines remains employed with the Company.

According to Mills, the Company has records reflecting company sales and there should be records documenting a slowdown in sales.[38]

Mills acknowledged that he never recalled Chesterfield or Harrigan and does not know if other members of management did either. However, he testified that Harrigan was employed with a competitor—Antilles Gas—at a better job and never asked for his job back. As for Chesterfield, he would not want to rehire her because of her behavior and attitude.

Mills admitted that he hired certain employees after the three were let go, namely Teddy Molyneaux in September 1, 1999,

---

Caines thought was unregistered. Caines says he did not refuse the assignment but demanded that Mills demonstrate that the vehicle's registration was proper. In his testimony, Caines implied that a union would be of assistance in these types of situations.

[29] Mills was the Respondent's designated representative at the hearing and, it should be noted, was present during the testimony of all witnesses.

[30] The Respondent did not produce any records or other documentation of Plaskett's time and attendance during his time with the Company.

[31] Mills indicated that this policy was set out in a brochure. However, the brochure was not produced.

[32] In making this denial of knowledge of Plaskett's union involvement, it is noteworthy that counsel for the Respondent's question was leading. Even still, Mills required that the question be repeated, and, as I observed him, his ultimate denial was forced and strained. (Tr. 171.)

[33] Mills did not describe this "letter," nor was it produced at the hearing.

[34] It should be noted that here, also, Mills' testimony regarding his lack of knowledge of Harrigan's termination came though leading questions posed by the Respondent's counsel.

[35] Mills explained that it was only when something in the office was "out of line" that he would directly interface with Chesterfield in a supervisory capacity and then he would usually deal with Chesterfield's supervisor, Andrews, for any corrective action. (Tr. 174.)

[36] The incident in question was the one Chesterfield testified about regarding the passage of Mills' messages through the intercom system. Mills did not produce this letter of reprimand at the hearing.

[37] Interestingly, according to Mills, Caines is actually only an assistant driver, but when he acts as a driver, he is expected to meet his quota. Notably, the Respondent produced no records to document Caines' employment.

[38] Mills testified that while records should exist, he did not have them in his possession. He offered no explanation for their nonproduction. It should be noted that counsel for the Respondent objected to this response and argued that Mills was not competent to answer questions regarding the business records, specifically the finance and accounting facets of the Company's business; for instance, accounts receivable, accounts payable, or any other financial documents. (Tr. 191.) I allowed the question and his response because Mills had previously testified he was the overall supervisor of the St. Thomas facilities.

and Luciano Warrell on February 25, 2000;[39] both persons are currently working for the Company.

4. The contentions of the parties regarding the 8(a)(3) allegations

The General Counsel essentially argues that the three employees Plaskett, Harrigan, and Chesterfield were discriminatorily discharged because of their support for and activities on behalf of the Union. She submits that on this record the Respondent knew or came to know that the Union was being courted by the employees because of their dissatisfaction with the way employees were being treated and, then, by virtue of conversations overheard by its supervisors and/or persons viewed by the workers as supervisors or leadmen, the Respondent determined that the three discriminatees were union adherents.

She further submits that the Respondent first by rumor supported by its possible surveillance suspected that employees, like Caines, were seeking union representation and upon Harrigan's disclosure that he was the "somebody" behind the union organizing effort, it became directly aware of his and its other employees' desire for and support of the Union. Additionally, she contends that the Respondent indirectly became aware of Plaskett's support of the Union by virtue of conversations among the employees, including those opposed to the Union and persons viewed as supervisors, e.g., Moses Bastion, who were privy to those conversations. She points out that Chesterfield, not coincidentally, was approached by other employees who knew of her grievances with the Company and sought her view of the Union because it was known at the Company that she supported the Union. Thus, she argues that the record amply supports a finding that due to its small size and its own efforts to ferret out union supporters, the Respondent knew either directly or indirectly of the activities of and support for the Union by the three alleged discriminatees; and they were discharged because of those activities. The Respondent essentially contends that it did not violate the Act and that the General Counsel failed to meet her burden of proof.

5. Legal principles applicable to the 8(a)(3) allegations

In cases where employers are charged with violations of Section 8(a)(3)[40] and (1)[41] of the Act, the Board set forth its test of causation in the case of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under this test, for determining, as here, whether an employer's layoff or discharge of an employee was motivated by hostility toward union membership or union activity, the General Counsel has the burden of persuasion, that protected activity was a substantial motivating factor in the employer's decision.

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge of that activity, animus, and adverse action against those involved, which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991).

If this initial burden is met, then the burden of persuasion shifts to the employer to prove its affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity.[42] If the reasons advanced by the employer for its action are deemed pretextual, that is, if the reasons either did not exist or were not in fact relied upon, it follows that the employer has not met its burden and the inquiry logically ends. Where an employer asserts a specific reason for its action, then its defense is that of an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of protected conduct. Thus, an employer cannot simply present a legitimate reason for its action but must persuaded by a preponderance of the evidence that the same action would have taken place. *Kellwood Co.*, 299 NLRB 1026, 1028 (1990).

Notably, the Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. [Fn. omitted.]" *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

It is well settled under Board precedent that the timing between the employer's action and known union activity can supply reliable and competent inherent evidence of unlawful motive for purposes of the *Wright Line* analysis. *Grand Rapids Press*, 325 NLRB 915 (1998); *Kinder Care Learning Centers*, 299 NLRB 117 (1990); *Alson Knitting, Inc.*, 301 NLRB 758 (1991). Also, where an employer accelerates a discharge or layoff of an employee in close proximity to union activity, this, too, may supply evidence of unlawful motive. *IMAC Supply*, 305 NLRB 728, 736–737 (1992); *American Wire Products*, 313 NLRB 989 (1994).

It is also well settled that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence; that finding may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

6. Discussion and conclusions regarding the 8(a)(3) allegations

The General Counsel argues, in essence, that she has met her *Wright Line* burden and that the Respondent's defense(s) should be rejected on grounds of pretext. The Respondent contends that the General Counsel did not meet her burden of proof, principally, in her failure to establish that the Respondent's president or other managers had knowledge of Harrigan's union activities or support; she failed to prove that Plaskett was laid off for reasons other than an economic slowdown;

[39] Warrell's application for employment is contained in GC Exh. 15 and indicates that he was hired as a truckdriver/helper.

[40] Sec. 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

[41] Sec. 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sec. 7 of the Act."

[42] The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors*, 157 NLRB 1295 (1996).

she also failed to prove that Chesterfield was laid off for her union activities as opposed to the slowdown in business and her not being a good worker. Thus, the Respondent argues that the General Counsel based on the "substantial evidence" of record failed to prove the allegations contained in the complaint[43] and that its actions against the three alleged discriminatees were based on a slowdown in its business; and that as to Chesterfield and Plaskett, their possible insubordination and poor work performance, respectively, also influenced management's decision to let them go.

Contrary to the Respondent, I would agree with the General Counsel and conclude that she has met her initial burden under *Wright Line*. First, contrary to the Respondent, it seems clear to me that the Respondent knew of the union activities of the three. Harrigan testified credibly in my view regarding his conversation with Mills at the bar where Mills first broached the rumors of the employees' desire for union assistance with their grievances, of which Mills, by his own admission, was aware. Harrigan, of course, announced that he was the "somebody" trying to bring the Union in. It is more than probable, in fact highly likely, that Mills communicated this revelation to Peguero, especially in view of Peguero's criticism that Mills was sleeping on the job where the Union was concerned. Moreover, Plaskett credibly testified that he, along with Harrigan, discussed the need for a union among the employees, some of whom were opposed to the Union and were viewed as supervisors by the employees and, in all likelihood, informed management about those who were advocating for the union representation.[44] I note also that Caines, a current employee,[45] was approached by Mills after Harrigan's and Chesterfield's layoff and told of Peguero's suspicions of his having introduced the Union and threatened with a layoff letter like the discharged employees. Thus, it would seem evident, in this rather small company, that word travels quickly and that Mills and Peguero knew of the union activity of the three prior to their discharge.[46]

I would also find and conclude that the General Counsel has demonstrated the Respondent's animus against the Union. As will be discussed in more detail herein, Peguero, during the Union's organizing campaign but after the discharge of the three employees, spoke to the assembled employees and made clearly antiunion statements and promised benefits to the employees to discourage their election of the Union. Finally, I would note that the timing of the layoffs is suspicious. Plaskett was terminated within about 2 days of having signed a union authorization card and with what appears to be no notice or warning. Harrigan and Chesterfield also were laid off within 2 weeks of having signed cards during the Union's organizing efforts, and close in time to the Union's filing of a petition for representation on July 14. In my view, the timing of layoffs of persons, known by the Respondent to have expressed grievances against the Company and support for the Union, amply supplies the inference that the action taken against them was motivated by their support of the Union and to discourage the selection of the Union by other employees.

The Respondent principally argues that the three workers were laid off because of its annual or seasonal slowdown in business and that union support or activities had nothing to do with the decision to lay them off.[47] The Respondent produced only one witness, Leroy Mills, to establish its defense and, therefore, his credibility is crucial to the Respondent's defense. However, I did not find Mills to be particularly credible. First, Mills, in terms of his demeanor, appeared nervous and hesitant and seemed on occasion to be buying time to make a response by asking simple questions to be repeated. He was not forthcoming and sincere and was sometimes evasive about matters not even in controversy.[48] Mills' testimony also was replete with answers to leading questions posed by counsel for the Respondent. Additionally, I was not favorably impressed with Mills' extreme willingness to disparage the General Counsel's witnesses. In my mind, this revealed an over-protectiveness of

[43] The Respondent has incorrectly stated as the applicable burden of proof, the test for judicial review of Board orders, that is "whether the Board's findings are supported by substantial evidence on the record as a whole" (*Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)) as opposed to the preponderance standard applicable at this stage of the proceedings.

[44] According to Plaskett, Harrigan, and Caines, in their view, certain employees—Moses Bastion and Merrifield—were supervisors or agents. Of course, it is the proponents' burden here to establish the supervisory and/or agency status of persons deemed as such. This was not done. Accordingly, I have not determined that these persons were indeed statutory agents or supervisors. However, I have credited Plaskett's testimony for the limited purpose that the persons he thought were supervisors were possible sources of information regarding the union activities of the alleged discriminatees.

[45] Board decisions of longstanding hold that the testimony against the interests of one's employer while still in its employ is entitled to added support and is not likely to be false. *7–Eleven Food Store*, 257 NLRB 108 (1981); *TRW Corp.*, 290 NLRB 6 (1998); *St. Anne's Home*, 221 NLRB 839 (1975); *Edward M. Rude Carrier Corp.*, 215 NLRB 883 (1974). In addition to his current employment status, I found Caines otherwise credible in that he testified forthrightly and consistently, and to a degree courageously, in the face of possible retaliation by the Respondent who, through Mills, clearly seemed quite willing to disparage him.

[46] While the Respondent's knowledge of Chesterfield's support for the Union is not as strong as that of Harrigan and Plaskett, in my view, I have credited her testimony regarding the two employees who did not sign cards (Dyer and Hanley) but who solicited her views on the Union. Clearly here, too, I believe under the totality of circumstances that the Respondent's management became aware of her support of the Union.

[47] The termination letter received by the three employees stated that they were being released because of a seasonal slowdown in business. There were no other reasons stated in the letters or otherwise provided to them at the time of their discharge. However, the Respondent (Mills) at the hearing also indicated that other reasons influenced management's decision. I view these others reasons—poor performance, low productivity, bad attitudes, absenteeism, leaving the job early—as self-serving make-weights offered to buttress the Respondent's economic defense. To the extent the Respondent includes these as defenses to its action, I reject them as self-serving, after-the-fact pretexts.

[48] At one point in his testimony, Mills was evasive and uncooperative regarding the Company's application form that was not properly copied—the start date was not legible on Plaskett's form (GC Exh. 13). The application form was identical to GC Exhs. 14 and 15, applications for Molyneaux and Warrell, and Mills surely should have known what the "start date" for Plaskett was; yet he hedged and evaded.

the Respondent on his part which was unnecessary, considering the Respondent's position that it was for economic reasons that the three were laid off. However, in spite of Mills' poor performance as a witness, his (and the Respondent's) major failing was to document its defense of economic decline. Notably, the Respondent failed to produce one document reflecting the decline it asserted; and it failed to produce a single competent witness (e.g., an accountant or bookkeeper) to inform the court as to the allegedly seasonal nature of its business.[49] In fact, the Respondent's defense seems implausible. It should be noted that the climate in the U.S. Virgin Islands is tropical. Therefore, it is unclear as to what the Respondent refers when it speaks of seasonal slowdown. It is also noteworthy that the gas the Respondent distributes and sells is primarily used for cooking, as opposed to, say, heating. It strains credulity that there could be "seasons" in which island residents cook less and for what reason. In any event, the Respondent produced absolutely no records to support its claim of economic slowdown and, in my view, this is fatal to its defense. Accordingly, I would find and conclude that the Respondent laid off Plaskett, Harrigan, and Chesterfield because of their support of the Union and that its defense of economic slowdown was pretextual.

C. The 8(a)(1) Allegations

1. The applicable law regarding the 8(a)(1) violations

Employer interference, restraint, or coercion of employees who exercise their statutory right to form, join, or assist labor organizations are unlawful under Section 8(a)(1) of the Act. The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959); Thus, it is violative of the Act for the employer or its supervisor to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995). The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). *Rossmore House*, 269 NLRB 1166 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 706 F.2d 1006 (9th Cir. 1985).

It is well settled Board law that an employer's interrogation of employees concerning their union activities may be violative of the Act. *Hudson Neckwear,* 302 NLRB 93 (1991). Among the circumstantial factors examined are the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). The Board has also considered other factors such as whether the questioning was by an immediate supervisor who worked closely with the employee, whether it was made in a joking tone, and whether the employee was an open, active union supporter, *Raytheon Co.*, 279 NLRB 245 (1986); *Action Auto Stores,* 298 NLRB 875 (1990); *Dealers Mfg. Corp*., 320 NLRB 947 (1996).

Section 8(a)(1) may be violated where an employer links terminations of employees to their union activities. *Area Metal Forms*, 310 NLRB 397, 400 (1993); and in likewise an employer may violate the Act by linking promises of improved benefits and wage increases to the employees' selection of a particular union. *Christopher Street Corp.*, 286 NLRB 253, 254 (1987).

Established Board law holds that a respondent's surveillance of its employees is unlawful (under Section 8(a)(1), regardless of whether the employee knows of the surveillance. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *Impact Industries*, 285 NLRB 5 (1987), remanded 847 F.2d 379 (7th Cir. 1988). Also, an employer violates Section 8(a)(1) if it even creates the impression among employees that it is engaged in surveillance. *Link Mfg. Co.*, 281 NLRB 294 (1986), enfd. mem. 840 F.2d 17 (6th Cir. 1988). However, the Board has found no violation of the Act in the case of management's close observation of an employee's activities while the employee was on duty or during break periods during the normal course of business. See *American Medical Waste Systems*, 311 NLRB 77 (1993).

The Board has enunciated the following test for whether employer has created an impression that it is surveilling the employees.

> [T]he test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their [sic] union activities had been placed under surveillance . . . The idea behind finding "an impression of surveillance" as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. [*Flexsteel Industries*, 311 NLRB 257 (1993).]

2. The Respondent's alleged surveillance of employees

The complaint alleges that on or about the end of May or the beginning of June 1999, Mills created the impression among the Respondent's employees that their activities in support of the Union were under surveillance.

The General Counsel called Harrigan to establish this charge.

As set out earlier in this decision, Harrigan testified that in a conversation at a local bar, before he was discharged, Mills asked if the employees had visited the Union, and that there were some rumors that somebody was trying to start a union. At the hearing, Mills, for his part, did not address directly this

[49] Counsel for the Respondent argues that Mills was incompetent to testify regarding the financial condition of the business. Thus, there actually was no one to establish the defense asserted, and no one to rebut the credited testimony of the three alleged discriminatees who did not observe or discern any slowdown in the Company's business.

particular statement, merely stating that he was not aware of the Union's organizing efforts until June 10, or thereafter.[50]

As I have noted earlier herein, I have generally credited the testimony of Harrigan, and here, too, I would credit his testimony and conclude that Mills made the queries attributed to him by Harrigan. Moreover, considering the totality of the circumstances and the record as a whole, I would find and conclude that Mills' interrogation of Harrigan was unlawfully coercive and violative of Section 8(a)(1) of the Act, as the queries reasonably created the impression in Harrigan's mind that the activities of the employees in support of the Union were under surveillance by the Respondent. *Fred 'K Wallace & Son*, 331 NLRB 914 (2000).

3. The Respondent's alleged interrogation of employees

The complaint alleges that around the end of May or early June 1999, the Respondent's president, Peguero, interrogated employees about their union sympathies.

The General Counsel called Caines to establish this charge.

Caines testified that sometime before the election—he could not provide a more specific date—Peguero called him into supervisor Andrew's office and privately asked him whether he (Caines) thought it fair that a small company like this should have a union. This private meeting which lasted around 5 minutes, according to Caines, took place on the same day Peguero later convened a staff meeting onsite of all of the staff. At this staff meeting, according to Caines, Peguero told all of the employees that we don't need the union, [we] are all one big happy family; that he would later take care of any problems the employees had; you can come to me; don't vote in favor of the Union; we can take care of our own problems within the company structure. Peguero, according to Caines, went on to say if the employees needed a loan, or anything, they could talk to him about it; that we would finance loans to buy new vehicles for everybody; that the employees could have their own parking spots; and the vehicles do not have to be the same kind, he would finance the cars. This meeting lasted about 1 hour according to Caines.

As noted, Peguero did not testify at the hearing.[51] Moreover, I have previously found Caines as entirely credible witness. Thus, I would find and conclude that the statements made to Caines in private were indeed made by Peguero. I would further find and conclude that considering the totality of the circumstances, including Peguero's contemporaneous promises of benefits made to the assembled employees, that the queries made of Caines privately by Peguero were coercive in nature and violative of Section 8(a)(1) of the Act. *Sunnydale Medical Clinic*, supra.

[50] I would note that I consider this a denial by implication. I note further that the Respondent did not directly address this charge in its brief, leaving the general denial in its answer as the sole rebuttal to the charge in question. As noted earlier herein, I did not find Mills to be a credible witness, and, in particular, I reject his testimony that he only became aware of the Union after June 10.

[51] Here, again, the Respondent did not directly address the allegation in its brief, leaving its general denial in its answer as the sole rebuttal to the charge.

D. The Challenged Ballots in Case 14–RC–8055

I have determined herein that Plaskett, Harrigan, and Chesterfield were unlawfully terminated. Since their votes were challenged because their names did not appear on the eligibility list submitted by the Respondent, I would recommend that they be deemed eligible and their votes be opened and counted in the tally of votes cast in the election.

The ballot cast by Clara Stevens was challenged because allegedly she stated that she was a supervisor. As noted, Stevens did not testify at the hearing. The Charging Party, Morales, offered no evidence regarding her status and proffered no argument regarding her position with the Company, although the scant record evidence suggests that she was and is employed by the Respondent, in all likelihood as an office worker. The Respondent also proffered no evidence regarding her supervisory status with the Company.[52] I would find and conclude there is little or no evidence to support the challenge, and I would recommend that employee Clara Stevens be deemed eligible to vote in the September 9, 1999 election and that her ballot be opened and counted toward the tally of votes cast in the election.

CONCLUSIONS OF LAW

1. Sun Tech Group, Inc. d/b/a St. Thomas Gas, the Respondent herein, is an employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By its supervisors' creating the impression that their union activities were under surveillance, the Respondent violated Section 8(a)(1) of the Act.

4. By interrogating its employees about their union sympathies, the Respondent violated Section 8(a)(1) of the Act.

5. By laying off (discharging) employee Christian Plaskett, Cresida Chesterfield, and Patrick Harrigan because they joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. By the aforesaid conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Having been unlawfully discharged, employees Christian Plaskett, Cresida Chesterfield, and Patrick Harrigan were and are eligible to vote in and to have their votes opened and counted toward the tally of votes cast in the election held on September 9, 1999.

8. There being insufficient evidence to support the challenge of the ballot of employee Clara Stevens, she is eligible to vote in and have her ballot opened and counted toward the results of the election held on September 9, 1999.

9. Respondent has not violated the Act in any other way, manner, or respect.

REMEDY

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend

[52] The General Counsel disavowed any part in the representation part of the proceeding, at least as to Stevens. GC Br. 23.

that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off (discharged) Christian Plaskett, Cresida Chesterfield, and Patrick Harrigan, I shall recommend that it be ordered to make them whole for any loss of earnings and other benefits they may have suffered by virtue of the discrimination practiced against them, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall further recommend that Christian Plaskett, Cresida Chesterfield, Patrick Harrigan, and Clara Stevens be deemed eligible to vote in the election held on September 9, 1999, and their ballots be opened and counted in the tally of total votes cast in the election, and counted in the results of the election.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[53]

ORDER

The Respondent, Sun Tech Group, Inc. d/b/a St. Thomas Gas, Charlotte Amalie, St. Thomas, U.S. Virgin Islands, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression among its employees that their union activities were under surveillance by the Company.

(b) Interrogating its employees about their union sympathies.

(c) Laying off (discharging) or otherwise discriminating against any employees for assisting the Union and engaging in concerted activities; and discouraging employees from engaging in these activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Make Christian Plaskett, Cresida Chesterfield, and Patrick Harrigan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the discharges of Christian Plaskett, Cresida Chesterfield, and Patrick Harrigan, and within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze any backpay which may be due under the terms of or other compliance with this Order.

(d) Within 14 days after service by the Region, post at its facility in Charlotte Amalie, St. Thomas, U.S. Virgin Islands, copies of the attached notice marked "Appendix."[54] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 26, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. Christian Plaskett, Cresida Chesterfield, Patrick Harrigan, and Clara Stevens are hereby deemed eligible to vote in the election of September 9, 1999, and their ballots cast in the election are to be opened and counted in the tally of votes cast in said election.

4. The challenges with respect to the ballots of Christian Plaskett, Cresida Chesterfield, Patrick Harrigan, and Clara Stevens are overruled, and the case is remanded to the Regional Director for Region 24 to open and count the ballots of the aforementioned persons. The Regional Director shall serve on the parties a revised tally of ballots and issue the appropriate certification.

[53] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[54] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."